

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

DAN E. LONG,

Plaintiff,

v.

**THE PROCTER AND GAMBLE
MANUFACTURING CO.,**

Defendant.

NO. 03-1097 T/An

FILED BY *[Signature]*
05 MAY 16 PM 3:39
ROBERT R. DI TROLIO
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W.D. OF TN.-JACKSON

**ORDER DENYING MOTION TO STRIKE AFFIDAVIT OF DAN E. LONG
FILED IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Before the Court is Defendant Procter & Gamble's Motion to Strike Plaintiff's Affidavit in Opposition to Motion for Summary Judgment filed on January 7, 2005. United States District Judge James D. Todd referred the matter to the Magistrate Judge for determination. For the reasons set forth below, the Motion is **DENIED**.

BACKGROUND

Defendant filed a Motion for Summary Judgment with the Court on August 9, 2004, and Plaintiff responded to Defendant's Motion for Summary Judgment on December 16, 2004. Plaintiff attached the affidavit of Plaintiff Dan E. Long ("Plaintiff") to its Opposition to Defendant's Motion for Summary Judgment. In the instant Motion, Defendant has asked the Court to strike Plaintiff's affidavit, or in the alternative to disregard various paragraphs in the affidavit, because the affidavit does not comply with the requirements of Fed. R. Civ. P. 56(e). Specifically, Defendant alleges that the affidavit contains various inconsistencies, is not based

upon Plaintiff's personal knowledge and because the affidavit contains statements that are based on inadmissible hearsay.

Plaintiff responded to the Motion to Strike on February 14, 2005. Plaintiff argues that his affidavit does not materially contradict his deposition. Plaintiff also argues that all issues of credibility must be decided by the jury, not the Court. Finally, in response to Defendant's argument that Plaintiff lacked the personal knowledge needed, Plaintiff argues that "[p]ersonal knowledge is a legal term of art, and the standard that should be applied by this Court is whether Mr. Long was in a position to obtain the knowledge or whether he can call witnesses to present the evidence at trial." (Resp. to Mot. to Strike, at 7).

ANALYSIS

The Federal Rules of Civil Procedure allow a party to attach exhibits to a motion for summary judgment or to a response to a motion for summary judgment. In particular, Rule 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). These three requirements are mandatory. See Charles A. Wright et al., *Federal Practice & Procedure* § 2738 (2d ed. 1983). Affidavits that do not satisfy the requirements of Rule 56(e) are subject to motions to strike. See *Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F. Supp. 2d 948, 954 (S.D. Ohio 2000).

"[A]ll materials submitted in support or in opposition to a motion for summary judgment must set forth facts that would be admissible at trial." *Fiordalisi v. Zubek*, 342 F. Supp. 2d 737, 741 (N.D. Ohio 2004). Nevertheless, "[c]redibility determinations, the weighing of the evidence,

and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Therefore, the Court should not strike an affidavit merely because it raises some concerns of the credibility of a witness.

In *TJ's South, Inc. v. Town of Lowell*, 895 F. Supp. 1125 (N.D. Ind. 1995), a tavern brought action challenging constitutionality of town zoning ordinance requiring eating and drinking establishments to obtain permission, in form of special exception, from town council and zoning board before presenting entertainment. When the plaintiff filed its Motion for Summary Judgment, the defendant moved to strike portions of affidavits submitted by plaintiff. The Court, however, held that because the motion to strike involved “matters of witness credibility and an overzealous definition of what constitutes a legal conclusion,” the motion should be denied. *Id.* at 1127.

In another case, an employer brought suit against a former employee to recover on a promissory note and an employment contract. The trial court entered summary judgment for the employer, and the employee appealed. On appeal, the Fifth Circuit Court of Appeals held that “a district court *must* consider all the evidence before it and cannot disregard a party’s affidavit merely because it conflicts to some degree with an earlier deposition.” *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893 (5th Cir. 1980) (emphasis added). “An opposing party’s affidavit should be considered although it differs from or varies his evidence as given by deposition or another affidavit and the two in conjunction may disclose an issue of credibility.” *Id.* (quoting 6 *Moore’s Federal Practice* ¶ 56-15(4), at 56-522). One exception to this rule is when an issue raised in an affidavit constitutes a sham. *See id.* at 893-94. A sham would be present, for

example, when a party attempts to inject a factual dispute through a contradictory affidavit to save the case from summary judgment.

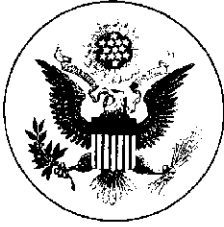
While it does appear that there are some inconsistencies between statements made by Plaintiff in his affidavit and statements made during his deposition, the Plaintiff may be able to explain the apparent inconsistencies or offer testimony from other witnesses to further explain or clarify the overall situation that he is addressing. Moreover, whether or not some of the statements are believable or not requires an assessment of the Plaintiff's credibility. As stated by the United States Supreme Court, credibility issues are for the jury to decide. Following *Town of Lowell* and *Bone*, the Court concludes that Plaintiff's affidavit should not be stricken, and Defendant's Motion is **DENIED**.

Pursuant to the Order of Reference, any objections to this Order shall be made in writing within ten days after service of this Order and shall set forth with particularity those portions of the Order objected to and the reasons for those objections.

IT IS SO ORDERED.


S. THOMAS ANDERSON
UNITED STATES MAGISTRATE JUDGE

Date: May 16, 2005



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Honorable James Todd
US DISTRICT COURT